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IN THE

Supreme Court of the United States

October Term, 1970

No. 1510

AIRWICK INDUSTRIES, INC., *et als.*,
Appellants,

v.

CARLSTADT SEWERAGE AUTHORITY, *et als.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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Appellants,

v.

CARLSTADT SEWERAGE AUTHORITY, *et als.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of New Jersey, which affirmed that portion of a trial court judgment that sustained against federal constitutional challenge the imposition by a municipal sewerage authority, created pursuant to state statute, of sewer service charges on the appellants as well as the exaction of taxes from them by the municipality which also furnished sewer service, without charge, to other residents of the municipality.

The Opinions Below

The trial court, the Superior Court of New Jersey, Chancery Division, Bergen County, rendered an oral opinion on June 13, 1969. It is not officially reported but a transcript of this oral opinion appears herein as Appendix A. The opinion of the Supreme Court of New Jersey is reported at 57 N.J. 107, 270 A.2d 18 (1970) and appears herein as Appendix B.

Jurisdiction

(i) This action was brought by appellants, 41 owners and/or occupiers of real property in the Borough of Carlstadt whose land is used for industrial or commercial purposes challenging the sewer service charges imposed on them by the Carlstadt Sewerage Authority, a public body created and acting under the New Jersey Sewerage Authorities Law of 1946, Revised Statutes of New Jersey, Title 40, Chapter 14A, Section 1 and following R.S. 40:14A-1, *et seq.*

(ii) The judgment sought to be reviewed is the ruling of the Supreme Court of New Jersey of October 26, 1970 which affirmed in part the judgment of the trial court entered on July 7, 1969. No petition for rehearing was filed. The Notice of Appeal was filed in the Supreme Court of New Jersey on January 18, 1971. On March 25, 1971 Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States extended appellants' time to docket the appeal in this Court to March 26, 1971.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2), 28 U.S.C. 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Tregea* v. *Modesto Irrigation District*, 164 U.S. 179, 41 L.Ed. 395 (1896); *North Carolina R. Co.* v. *Zachery*, 232 U.S. 248, 58 L.Ed. 591 (1914); *DeVeau* v. *Braisted*, 363 U.S. 144, 4 L.Ed. 2d 1009 (1960); *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654 (1960).

(v) The validity of the New Jersey Sewerage Authorities Law of 1946, Revised Statutes of New Jersey, Title 40, Chapter 14A, R.S. 40:14A as applied by the appellees, the Borough of Carlstadt and the Carlstadt Sewerage Authority is here involved. The portions of that statute most

pertinent are Section 3(6), R.S. 40:14A-3(6) which provides:

> "(6) Subject to the exceptions provided in section four of this act, 'district' shall mean the area within the territorial boundaries of the county, or of the municipality or municipalities, which created or joined in the creation of a sewerage authority;"

and that part of Section 8(b), R.S. 40:14A-8(b) which provides:

> "(b) Rents, rates, fees and charges, which may be payable periodically, being in the nature of use or service charges, shall as nearly as the sewerage authority shall deem practicable and equitable be uniform throughout the district for the same type, class and amount of use or service of the sewerage system, * * *"

Questions Presented by the Appeal

1. May a municipality, by means of the creation of a sewerage authority pursuant to the Sewerage Authorities Law of 1946, R.S. 40:14-A1 *et seq.*, divide its geographic territory into two areas and provide sewer service to residents of one area without direct charge therefor, while residents of the other area are charged for sewer service?

2. Does not such a division of the municipality into two areas, one with sewer service paid for by general taxation to all residents while additional sewer service charges are imposed upon residents of the other area, deny equal protection of the laws and due process of law to the residents of the second area contrary to the requirements of The United States Constitution, Amendment XIV, Section 1?

Statement of the Case

The defendant The Borough of Carlstadt (hereinafter sometimes referred to as "the Borough" or "Carlstadt") constructed and has been operating and maintaining a sanitary sewerage system in its western portion since prior to 1938. At that time the Joint Meeting of Rutherford, East Rutherford and Carlstadt (hereinafter referred to as "the Joint Meeting") was established for the purpose of collecting and treating the sewage from the western section of the three boroughs in the Hackensack River drainage area west of Route 17, and said Joint Meeting constructed a sewage treatment plant. Said three boroughs occupy a total area of approximately 6,700 acres, of which approximately 42%, or 2,800 acres, has been developed and sewered. The Borough of Carlstadt does not impose any direct charges upon the users of that sewer system for the sewer service rendered to them by the Borough and the aforesaid Joint Meeting, but pays the costs of such service out of revenues raised by general taxation of all real property in the Borough.

Thereafter, the Borough entered into an agreement with the Bergen County Sewer Authority under date of June 15, 1967. Therein the Bergen County Sewer Authority agrees to propose a plan for an intercepting sewer or sewers which will extend service *to all or a portion* of the Borough of Carlstadt, and to extend *ad interim* service to the area of the Borough east of Berry's Creek. It is further agreed therein that the Borough, upon notice of the availability of service from the Bergen County Sewer Authority, cause and permit its sewer or drainage system to be connected with that of the Bergen County Sewer System.

The Borough created the defendant the Carlstadt Sewerage Authority (hereinafter sometimes referred to as the "Sewerage Authority") by Ordinance finally adopted on

June 21, 1967, and assigned to it on the same day without written consent of the Bergen County Sewer Authority its agreement with the Bergen County Sewer Authority. It is interesting to note that in said "service contract" district is defined in Section 101 (10) as follows:

> " 'District' means the area within the territorial boundaries of the Borough;"

and sections 204 and 205 of the agreement suggest that the Borough contemplates conveying to the Sewerage Authority the sewer system it operates west of Berry's Creek. Section 404 of the agreement prohibits the Borough from constructing any facilities for the collection or disposal of sewage without the express written consent of the Sewerage Authority.

The Sewerage Authority adopted a schedule of sewer service charges and revised such charges on April 11, 1968.

The Sewerage Authority thereafter proceeded with construction of its sewer system in an area of approximately 650 acres in the easterly portion of the Borough.

Commencing in November, 1968 the Sewerage Authority sought to impose and collect sewer service charges only upon those owners or occupiers of real property in the easterly portion of the Borough where it constructed its sewer system.

The Borough continues to render sewer service without direct charge to owners and occupiers of real property in the westerly area within its territorial boundaries, the cost of said sewer service being paid for out of revenues raised by general real property taxation. That is, out of taxes paid by the appellants in the easterly portion of the Borough as well as other property owners.

This double payment by the appellants of real property taxes and sewer service charges, when property owners in other portions of the Borough pay but taxes and receive

sewer service free, denies appellants the equal protection of the laws and deprives them of property without due process of law in violation of the United States Constitution, Amendment XIV, Section 1.

The appellants raised the federal question of violation of their constitutional rights in their Complaint. The Pretrial Order entered by the trial court on May 15, 1969 set forth among the issues to be decided the following questions:

> "Does not the artificial division of the Borough of Carlstadt into two areas with different sewer service violate the United States Constitution, Article XIV, Section 1, and deny to the plaintiffs due process of law and equal protection of the laws?
>
> Is not the division of the Borough of Carlstadt into two areas, one receiving free sewer service and the other receiving sewer service with charges therefor, violative of the Sewerage Authorities Law, in that such sewer service charges are not uniform throughout the district for the same type, class or amount of use or service of the sewerage system?"

The trial court, in its oral opinion held:

> "I will therefore find that there is no inequality or no violation of any constitutional provisions with respect to equal protection of the laws or due process, * * *, and I am so holding in this case." (Transcript, p. 728).

The Supreme Court of New Jersey, in affirming that portion of the trial court's holding said at page 118 of 57 N.J.:

> "Thus the classification of plaintiffs' lands rests on real and not feigned differences and the action of the municipality in making a special charge for sewerage disposal is constitutional."

The Federal Question is Substantial

The Borough of Carlstadt has within its territorial boundaries extensive meadowland that is in the process of intensive industrial and commercial development. Such development and the particular topographical conditions existing within this municipality have created intense and immediate ecological problems. Among these is the absolute necessity for the provision of appropriate sanitary sewer service. In the early stages of this development there has been serious pollution of the area and the Hackensack River Basin. Carlstadt and other municipalities in the area must, either directly or indirectly, provide sewer service to avoid and correct such pollution. The municipality pursuant to the New Jersey Sewerage Authorities Law, R.S. 40:14A-1 *et seq.* has elected to provide these facilities through a sewerage authority. This method enables such sewerage authority to provide a sewerage system out of revenues raised by the sale of bonds that do not burden directly the debt structure of a municipality while on the other hand providing public services that benefit, either directly or indirectly, all citizens of the municipality.

Though municipal sewerage authorities have been known in New Jersey since 1946, counsel for the appellants is unaware of any municipal sewerage authority which service but a portion of a municipality while providing services that benefit the entire municipality. In this case, Carlstadt and its sewerage authority, in its haste to provide the services, has done so in a manner that deprives appellants and other industrial and commercial users of a sewerage system in the easterly portion of the Borough of equal protection of the laws by imposing double charges on them—one charge for sewer service; and a second charge by way of real property taxes that are used in part for providing sewer service free to owners and occupiers of

real property in the westerly portion of the Borough, some of which are also industrial and commercial users.

The decision of the New Jersey Supreme Court from which this appeal is taken, *Airwick Industries, Inc.* v. *Carlstadt Sewerage Authority*, 57 N.J. 107 (1970), purports to sanction such unconstitutional application of the Sewerage Authorities Law, 40:14A-1 *et seq.*, *supra*, to the plaintiffs and others in similar circumstances.

These rulings will have far reaching effect not only in the New Jersey meadowlands and the development of sewerage systems therein, but in the development of sewerage systems by municipalities and municipal corporations generally.

Accordingly, it is deemed essential that the jurisdiction of this Court be invoked to decide these federal questions.

CONCLUSION

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX A

(Opinion of Trial Court—Superior Court of New Jersey, Chancery Division, Bergen County)

Oral Decision

The Court: Although I've asked Counsel to limit themselves in their summations, because they filed very extensive and complete briefs on the various issues in the case, I would ask you to have patience with me because I haven't filed any brief in this case—any written opinion—and in giving my opinion I must necessarily make findings of fact and render conclusions of law, and in order to get a proper perspective and understanding of them so as to make the opinion complete, it does become necessary for the Court to set forth the various contentions of the parties, and, as I say, even though I know you know them, it would seem that that would take some additional time.

As I stated previously, in rendering its decision, in addition to making findings of fact, the Court must also state its conclusions of law. Now, in applying the law to the facts in the case, it is the duty of a Trial Judge to decide the law on the basis of the precedents. In other words, if there are decisions on the matter, this Court is bound by such precedents of the appellate or Supreme Courts. So that whether the Court agrees or disagrees with the arguments of Counsel as they apply in the case, I must nevertheless conform to the decisional law—the Trial Court, being a Trial Court, and being required to comply therewith.

This is an action brought by numerous plaintiffs for a *declaratory judgment* as to the validity of certain schedule of sewer service charges adopted by the defendant, Carlstadt Sewerage Authority.

The plaintiffs also attack the—or question the validity of the bills or charges rendered thereunder.

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It is also an action for *declaratory judgment* that the schedule of sewer service charges, and the actions of the Sewerage Authority and the Borough violate the constitutional provisions in that they deny the plaintiffs due process of law and equal protection of the law and violate the specific statutory provisions of 40:14A-1 *et seq.*

In addition, there is a counterclaim which seeks to compel the plaintiffs to connect to a sewer system, and also for damages.

The plaintiffs also seek to enjoin the collection and the assessing of sewer service charges, and to enjoin the cutting off of any sewerage service or water service to those who already are connected.

This case may also be described, actually, as a number of cases which have been consolidated for trial, and in addition to the type of action which I have referred to, there was also another case which was brought by Pur-All Paint Products Company, et al, which challenges the action of the Borough and the Sewer Authority in requiring these plaintiffs to connect up with the Carlstadt sewerage system because, in fact, the plaintiffs had obtained permission some years previously from the Borough of Carlstadt to connect into the Moonachie sewer system, and, in fact, the plaintiffs not only secured their permission by way of a formal resolution, but did, in fact, connect with the Moonachie sewer system, and did pay an assessment charge—sewer assessment charge—of $3,536.08, in addition to, of course, paying for any cost of installation, and have been billed and have used the Moonachie sewer system ever since, and it has been adequate. So that insofar as Pur-All Paint Products, et al, are concerned, their existence and their use of the premises did not in any sense constitute a nuisance—that is, it does not create any polluted condition such as is charged in connection with the other plaintiffs if they do not connect up with the Carlstadt Sewerage Authority.

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So we have these two general types of cases, and as I have said, there are approximately 49 plaintiffs involved in the suit, and except as to Pur-All Paint Products, all others have joined together and are being represented by Mr. Klinger.

A stipulation of fact was entered into between the parties which is attached to the pre-trial order, and in order to save some time, I, of course, will not repeat those findings of fact, but they have been stipulated. I, of course, make such findings of fact.

It is also stipulated—and, of course, there has been proof thereof, nevertheless, but it has been stipulated there exists within the geographical area of the Borough of Carlstadt, an area generally west of Berry's Creek which is served by a sewer system which renders sewer service to commercial and industrial properties, as well as private residences, within said geographical area without imposing any separate charge or sewer charge upon said residents and users for said sewer services.

I mention that because in some of the requested findings of fact, it is asked that I make that finding, but it has been stipulated and I make it and it is uncontradicted that that is the fact.

In addition to those facts stipulated, proofs were offered by the various parties consisting of numerous exhibits and the testimony of Peter Homack, a hydraulic and sanitary engineer, who testified on behalf of the plaintiffs; Lester S. Sheredy, a registered municipal accountant, who testified on behalf of the defendants; Richard L. Tecott, a municipal bond dealer who testified on behalf of the defendants; Robert Hollenbeck, Chairman of the Carlstadt Sewerage Authority, and Wayne Eakins, a professional engineer, both of whom also testified on behalf of the defendant. The Court has, of course, considered all of the proofs in the case. I haven't read through each one of the voluminous records in evidence, but I have read that

which is necessary, that is—and I believe the parties have agreed—that even in offering these proofs, it isn't necessary to consider in this case every item that is in the documents, because they do not deal with any of the issues. So I've considered them all with respect to the issues in the case, and the Court, therefore, is required, as I have indicated at the outset, to make its findings of fact within the confines of the proofs; within the confines—the Court is limited by the evidence in the case.

I will attempt as best I can, without setting forth the detailed contentions made by the plaintiffs, and by the respective defendants, to try and boil them down into the real issues in the case, so that the fact that I may not specifically refer to each and every one of the miscellaneous contentions as set forth in the pre-trial order does not mean that I have not in any way considered them, but, as I say, it would certainly not be necessary for the Court to refer to each one of these contentions.

But basically the plaintiffs contend that the Borough of Carlstadt has been a member of the Joint Sewer Meeting consisting of Carlstadt, East Rutherford, and Rutherford, and I believe the testimony was since 1938 or approximately thereby, these three municipalities operated this one sewer system, but insofar as the Borough of Carlstadt was concerned, the sewer system did not serve all parts of the Borough which is spread out from the Hackensack River westerly to Wallington on one side, on the complete westerly side, and the only portion of the Borough that was served as set forth in the sketches—and there is no dispute thereof—which consists of probably less than—probably a fifth—I'm just looking at the map and trying to estimate it by looking, but certainly a small portion of the Borough insofar as area was concerned was serviced by the Tri-Borough Sewer System. The balance of the Borough consisting of vast acres of undeveloped meadowlands and other vacant lands, some of which are now within this Carlstadt

Sewerage Authority area, and which is the subject of this suit, but the service rendered by the Tri-Borough or by the Joint Sewer Authority was rendered to those in Carlstadt without charge to the individual—that is, the Borough paid through a general appropriation the costs of maintaining this and paying off this sewer, so that the individual citizens who are taxpayers paid their taxes but did not pay a separate sewer charge, but they did pay for the sewer charges in their taxes. I want to make that clear because you get nothing for nothing and when they pay their general taxes it does not mean they didn't pay for sewers, but everybody in the town paid the taxes, so that those who didn't have the sewers also paid for those who had the sewers, and this is contended for in substance by the plaintiffs. And they contend that in 1967 the Borough created the Carlstadt Sewerage Authority pursuant to the *Sewerage Authorities Law,* and that they proceeded to create a fictitious and false division within the Borough of Carlstadt in connection with the design, construction, and operation of a sewer system.

To summarize generally the argument made, it is that by law—that is, under the statute and by intent, the Borough of Carlstadt could only—and did only—create one sewerage district, that is, whatever the boundaries were that were set up in the bonding ordinance which were not the entire Borough, but only a portion thereof, which, I suppose, I could generally describe as what is in Stage I and Stage II, so when you look at the map you will know exactly, as I am looking, at just that part of it, without trying to describe it geographically. But it is contended that under the law and also by intent because of certain openings made, or openings left in the contract agreement between the Borough and the Bergen County Sewer Authority, it was really intended someday that this would really cover the whole town, and, therefore, it should be construed

to cover the whole town. And there were also some proofs with respect to the fact that other towns have given notice —East Rutherford, rather, has given notice they intend to get out of the Joint Sewer—that is, East Rutherford, Rutherford, and Carlstadt—and that, in fact, Carlstadt intends to get out, but the fact is they have not. The Joint Sewer of Carlstadt, East Rutherford, and Rutherford is in existence and is actually being used for the benefit of the three municipalities. So that the Court must make its determination based upon the proofs in the case and upon the law to be applied thereto as to whether or not the Borough of Carlstadt, within the jurisdiction of the Sewerage Authority, actually constitutes one district, because if it does then, of course, all the rates, et cetera, rents, charges, must be uniform, and therefore, if a resident, for example, pays a certain rate—and under the new sewer they have to pay it—under the old sewer, too—because it's all one district. Whether it was intended to be so by the Borough, it is contended for by the plaintiffs that the law requires it to be so, and, of course, they further contend that it was intended to be so.

The Court finds after, as I say, an examination of the facts and of the law that it is within the power of the municipality in setting up the Carlstadt Sewerage Authority to limit the area of any part of the area within the Borough—that is to say, you might have two sewerage authority districts, and that may actually be what happened in Carlstadt, because from looking at the map, there is such a vast area of land east of the lands in question, as to perhaps make it desirable—I don't know—but they might decide to do that. In any event, I do find that the Borough intended to and did, in fact, create a separate sewerage authority its own separate area, which did not include that area west of Berry's Creek which is still serviced by the Joint Sewer—that is, the sewer authority consisting of Carlstadt, East Rutherford, and Rutherford.

Now, of course, this raises another question as to which there was not devoted as much time as was devoted to the other issues, nor was the matter briefed to the extent that the Court would like it, because the clearer law is—of course, the simpler it is for the Trial Court to simply apply it to the facts—and in my review of the law and in my analysis of the facts, I have had great difficulty, because, as I believe I expressed to Counsel during the trial, having determined that there is a sewerage authority district as distinguished from the rest of the Borough, the present situation with respect to sewers and charges is that those joining up with the Sewerage Authority are required to contribute, and no effort has been made to determine the particular apportionment. That would be a rather complicated process, but I suppose it could be done, because insofar as making up the appropriations or determining the revenues that the Borough receives, essentially, most of the revenues come from land taxes. There are other revenues, but I say, basically, they come from the assessments on the land and improvements and those who are served by the new Sewerage Authority pay, therefore, taxes based upon the entire revenues.

So that it would seem logically and in fairness to the Court that some provision must be made or should be made for easing the tax burden of those in the new Sewer Authority who would have to make up, as I say, an approximate sum of $30,000 a year which, as I recall, is approximately maybe $30,000, $33,000, a year, or $35,000 a year, but I think it's within that range, being the cost to Carlstadt for maintenance of the sewers in the land west of Berry's Creek.

So to some extent I say those who are within the new Sewer Authority must not only pay for their own sewerage, but also help generally to pay for the $30,000 or $35,000 total cost.

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And if I had to decide the case based on the logic that I have just stated, I would have no hesitancy in stating that there should be some mechanics—just how that should be done, that would not be for the Court to determine in this suit—for abating this sum of thirty to thirty-five thousand dollars insofar as the plaintiffs are concerned, and other land owners in the new Sewerage Authority district.

However, in my examination of the cases, I noted in the case of *Jersey City Authority versus the Housing Authority of Jersey City,* in *40 N.J. 145,* reported 1963, wherein issues were involved, not identical to the issues in this case but involving a situation wherein the Sewerage Authority sought to recover service charges for treatment of sewage from the Housing Authority which then pleaded the city as a third party for indemnity, and the issues revolving about the claims made by the Sewerage Authority, not as to amount but as to the service charge itself; whether the Housing Authority should or should not pay because of its governmental connection, is just about the way I can summarize it.

But in reviewing the facts in the case as the Court stated the facts to be—and I will read this verbatim—the Court stated—and this is starting at page 156—

"Although we conclude that under the two cooperation agreements, Housing is to pay for municipal services for which other property owners pay a separate charge or fee, Housing further argues inasmuch as city furnished sewer service without charge prior to 1957, it cannot relieve itself of liability for that service under the contract by creating a Sewerage Authority, transferring to it the responsibility for providing adequate sewer service and allowing the Authority to charge for the service rendered. It is clear from the 1954 agreement between City and Sewerage that there are two sewer systems used in disposing of sewage"—

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And now I am coming to what may be pertinent to the case at issue, and I'll just read that again—". . . It is clear from the 1954 agreement between City and Sewerage that there are two sewer systems used in disposing of sewage; the old system operated by the City and the new system operated by Sewerage. The latter offers a new and different service which was not in existence in 1939 or 1950 when Housing and City executed their agreements. Moreover, the 1954 agreement limits the service charges (a) for the use of such sewer system, and (b) to pay and provide for the expenses of operation and maintenance of the sewer system."

And then the Court states as follows:

"Nowhere in this agreement is there a provision for charges for the operation and maintenance of any part of the old system which presumably still offers its services free of charge to all property owners, including Housing, without discrimination."

And it would seem to me that this being an issue in the case—that is, at least it is referred to, and the Court making no disposition requiring, under the circumstances, that because one part of the town under the Sewerage Authority would pay, the other part—the old system must also pay, would seem to me that this Court should not at this time adopt a rule contrary to one that was adopted by the Supreme Court. As I say, I have had some difficulty with this, but it would seem to me that a Trial Court is bound by decisional law. It also may be that the Court was no—the Supreme Court was not asked to decide specifically this question, but I have no way of knowing that, and, therefore, keeping in mind what I stated at the outset, that I am bound to apply the law as it has been settled rather than to attempt to make any changes, even though I may have some questions as to logic based upon the payment of an extra charge to help pay for the sewers for some other part of

the town, I will therefore find that there is no inequality or no violation of any constitutional provisions with respect to equal protection of the laws or due process, because our Supreme Court has, in that case, held, and I am so holding in this case.

My understanding is—but if there be any question with respect thereto—my understanding is that no attack has been made upon the validity or the existence, that is, the creation and existence of the Carlstadt Sewerage Authority, but I am satisfied from all of the proofs that it was properly created and in accordance with the law.

In order to have an understanding as to the effect of the creation of a sewerage authority, our Courts have stated with respect to such types of authority that there is a substantial difference between a municipality and the authority created by the municipality, because in some contexts, sometimes it is said—and I believe it was so stated in the case of *Camden County versus Pennsauken Sewerage Authority,* reported in *15 N.J.,* at page 456—in some contexts one is the alter ego of the other, and in that case the context being that it was not necessary for the town—that is, their own municipal building to pay a sewerage fee, it's like paying it to itself, and that was one of the issues there, but basically there is a substantial difference between the municipality and the authority created by the municipality.

One of the primary reasons for the creation of a municipal authority is to permit the taxpayers to be relieved of the financial burden connected with the construction and operation of the public facility, and to have the authority bear all of the costs involved in order that they may be liquidated from the revenues received by the authority for the use of the facility. See *40 N.J. 227, 1963,* which in that case dealt with a parking authority rather than a sewer authority, but it is to be noted in this case from an examination of the proofs as they relate to the various surveys and various recommendations made, that those responsible

for the creation of the Carlstadt Sewerage Authority, did, in fact, exhaust all means—and I didn't use the words, "all reasonable means," but I said all means. They took into consideration every course that might be followed, and before discarding it, made a study to determine whether or not it was feasible.

It should not be necessary for the Court to outline in any detail the reasons given as to why the municipality finally determined to set its course by way of creating the Carlstadt Sewerage Authority, because as I have just stated, it is summarized in what I have just stated as to the reason for the creation of the Authority. This was finally decided to be the only feasible, practical—perhaps the only way that it could have proceeded to make the improvements to the extent of more than five million dollars—ultimately more than five million dollars—within its power under the law. That is, it is limited by certain debt limitations, et cetera.

So that the Court finds if there is any issue, and it may be that there has been no issue to this, that the decision in creating the Carlstadt Sewerage Authority and the creation thereof certainly was proper and legal in all respects.

We come now to what really is the crux of the case, and that is the rate schedules as set by the Carlstadt Sewerage Authority, and these rates and service charges are authorized under *N.J.S. 40:14A-8*, and, as I say, to a large extent the issues in this case really revolve about the contention made by the plaintiffs that these rates are unconstitutional; they are not set up so as to be fair and equitable and uniform, and in fact impose a great hardship without authority thereof upon numerous of the plaintiffs.

The statute is clear to the extent that I believe our legislators recognized that the problem of setting rates and charges is an extremely complex one. So that when I say it is, "clear," it is clear that it was so recognized, and for

that reason—and it is so because the rates depend on different types of municipalities and different types of buildings and different uses, and certainly there are so many variances that it would be impossible for the legislature to say in dollars and cents this is what must be paid, because if anything, that might not be practical and equitable. So the statute says, "The rents, the rates, the fees, and the charges, being in the nature of use or service charges, shall, as nearly as the Sewerage Authority shall deem practicable and equitable, be uniform throughout the district for the same type, class," et cetera, and then it describes some of the factors which have been gone into in great detail which would make up the rate system.

Then, in addition to setting up these factors, the statute sets up this factor: "On the capacity of the improvements on or connected with the real property." Because, in creating the rate schedule, the Sewerage Authority, in my opinion, set up a simple—that is, a type of rate schedule that could be simply administered. To that extent it would be practicable. That is, you just go out and measure the square footage of the buildings and you have got one rate and that is the capacity charge that I have just referred to. That is relatively simple insofar as that charge, and then in addition they set up a use charge of one dollar per thousand gallons, and this was based upon a reading taken of the water consumed rather than the water discharged, as I understand it. So they got the Hackensack Water Company, if that is where they got the water, and I suppose, if water were received directly from a well, meter the well, that's as simple as you can get it. So certainly it is practicable from that standpoint.

The question raised is that it is not uniform; it is not equitable; it is not fair; it is not just, and, therefore, the Court has heard considerable testimony explaining just what this capacity charge is; how it was arrived at; whether it was just an arbitrary figure or whether it was

based upon reason or logic or upon some other factor. And the proofs now, as I understand them, are uncontradicted, that the capacity charge of 10.5 cents per square foot of building constructed on the premises, being served or available to be served, which also provides for a minimum capacity charge of $150 per year, was in fact based upon the calculations of the operating expense of the municipality and the debt service—that is, the annual debt service of the municipality, and it was determined and so applied that the operating expense of a municipality could and would be provided for adequately by setting up a use charge of one dollar per thousand gallons to cover the operating costs. And in answer to the Court's question as to what the operating expense was for '69, the answer was approximately $40,000, and what the debt service was, and the answer was approximately $400,000, and I say without getting technical about the ½ cent figure, that is exactly how it works—how it works out.

So this is how the amount of 10½ cents was determined. Not why the capacity charge was made, but how they arrived at the amount of it. I am satisfied from the reading of the statute, and my analyzing the law, including some of the cases referred to by all sides of this case, the *Landy* case, *Landy versus Bellmawr Sewerage Authority,* 61 Super 396, and which was the Appellate Division decision of *Kline versus Bellmawr* in 55 Super 153, and also the case of *Jersey City versus the Housing Authority* in 40 N.J. 149, which I have already referred to, which have considered—but not completely—this particular issue, that is this particular issue is not exactly in issue, but reference was made to the meaning and the effect of the charges, rates, rents, fees, as referred to in 40:14A-8, and then in the Supreme Court case at 40N.J. at page 149, the Court stated, "The Trial Court found, and we agree, that the charge for the treatment of sewage by Sewerage to eliminate pollution is not a tax or special assessment, and con-

sequently not within the meaning of N.J.S. A-55:14A-20," and I mention this because the plaintiffs' argument is that in effect—call it whatever you may—the Sewerage Authority has attempted and has done indirectly what they cannot do directly, that is, make an assessment on the various owners and the users of the property.

Now, the Court has very carefully listened to the witnesses who testified, who were of great help to the Court, and I find that both of the witnesses were expert and credible, but they simply came to different conclusions, and just as a jury must decide questions of fact based upon opinions of experts, so the Court therefore must make a finding of fact based upon the opinions of experts, giving due deference to these experts. In practice, in effect, the results of applying the 10½ cents per square foot of the building has resulted in large inequities insofar as those using the facilities—that is, using the actual gallonage—is concerned, and this is conceded by the defendants' Counsel—that is, if you took just that one item, there would be inequities, but if you had to consider everybody, and in considering everybody, there would really be no inequities, because it's the best system you could come to, and on the other hand, the defendants' experts stated that if you took what was referred to by the plaintiffs' experts as the best and most accurate determination in arriving at the usage, namely, the metering of the flow-out which would be exact and positive and accurate, that this would create more inequities because then it would impose on the users—when I say "users", the gallonage users—the full cost of the service, as well as the use, and the statute refers to both service and use. So that all of the parties involved, that is, the property owners and the users of the system, he says should pay, not only for the actual use of the—that is, the gallonage use, but the service

rendered and that's logical, and I don't believe that it is actually disputed by plaintiffs' witness. I think in his testimony he did not say there should be no service charge. I don't know whether he was asked that specifically, but I don't believe he said there should be no service charge, but he attempted to accentuate the inequity by the use of the method used by the Sewerage Authority, by setting up a table indicating these items, and I won't go through them but just taking one, it shows that—for example—and I just used this as one example, but there are many others, but in the case of a certain type of building such as a warehouse which is actually in existence, it is not hypothetical, I think it is the Lord & Taylor plant, that because of the size of the plant, because of the nature of its use as a warehouse, having very little need for sewerage—and when I say, "little need", that may be questioned, whether you need it a little bit or not, it is still needed. I am just saying that because in the sense that it only has a flow of—let's say, of a limited amount of sewerage, whereas Yoo-Hoo, for example, has a much, much larger flow, and because the Yoo-Hoo plant is smaller than the Lord & Taylor plant, Lord & Taylor's pay—again, I am guessing on it, I don't have the exact figures—but approximately $20,000, compared to perhaps $1,600 paid by one who uses more sewage. So on its face, it would seem to be equitable if you had to pay it. If you did have to pay it, it's very equitable. As to Yoo-Hoo, it would be equitable, but not to Lord & Taylor. And to me the problem presented seems to be literally capable of solution, that is, the problem presenting itself seems to solve itself because I'm satisfied after reviewing the statute and the intent of the statute and the experience of those engaged in this kind of business, the sewerage business, that it was contemplated and it was intended that those who benefit from the use, from a sewer facility, should pay a service charge and a use charge, and that

the statute is clear on that, because it says—and I read it before, the said service charges may be charged to and collected from any person contracted or in connection or use or service. In other words, it uses those terms a number of times in the statute. So it was intended that they pay a service charge. If you want to call it a capacity charge, a service charge, and a use charge meaning actual gallonage that it uses, but because the statute allows the Sewerage Authority to make such a charge, does that mean that the Authority can make such charge on any basis? Does it mean that they can make it on the basis of operating costs and debt service—that is, does it mean that they can simply take your whole debt service and say, "Well, this looks like a good way of solving the problem. It's simple for us", that is, the municipality or Sewerage Authority. "We'll just take the capacity charge and we'll place that alongside of the debt service and we'll say, "Well, this ought to take care of that."

And the other one, the use charge, that can be taken care of, "We'll figure out what the operating cost is and say that's the use charge."

I don't think the statute contemplated that. It didn't say that. If it did, it would have. It may be in practical effect that even if that is done it may, perchance, by some coincidence, turn out to be equitable. I don't think so. I think that it shows up here that it is not, and, therefore, it would seem to me, and I don't have the right or the authority or the ability to decide just how to work this out, but there should be a more compatible or better proportionment of that service charge to the use charge, and I just take this as an arbitrary figure, but just from listening to the case, for example, and again I don't wish to have anyone accept this as a recommendation of the Court or as a finding of the Court, but certainly just from the facts that are testified to here, in doing some quick arithmetic, a 3 per cent capacity charge would probably result

in certainly a much better equitable result, but I haven't done it as well as it should be done. This should be done by survey, as they did it before, because maybe that isn't it. Maybe it would show another inequity some other way, and that is why I say that. And it is interesting to note—this is a case, I don't believe it was cited, it might have been, but I don't believe it was cited by Counsel, but in my own review I noted a case, *Hickory Township versus Brockway*, it's an out-of-state case, reported *192 Atlantic 2nd*, at page 231. As I say, I am not attempting to indicate that this is dispositive of the issues, but in surveying these issues of rate charges, after various contentions were made, the Court said, "Nor are these cases authority for the proposition that rental must be proportioned with exactness to the use made of the sewers. What they say is that the charge must be reasonably proportional."

Then they go on to say, "Not to the use made of the system, but to the value of the service rendered."

Of course, there, as they say, they strongly favored the service rendered over the use. Because of the issue, I think you have to read the case in line with the issue involved, and, as I say, in that case which involved a motel, and a charge that would be extremely small compared to the issues in this case and that is another thing you have to decide. You have to decide the facts in this case. You cannot take the law as it was applied in another case if the facts are not applicable to the law. And, therefore, as I say, I would find insofar as the capacity charge is concerned that this charge is not proportional; is not properly related to the service charge and use charge, both, because as I have just said it seems to me that both charges may properly be made, and it is for the Sewerage Authority to determine within their reasonable discretion what that may be, but you have got to come up, as I say, with a formula that will also be equitable, and that, of course, is one of the statutory provisos.

Appendix A

As I say, the question of use and service was also discussed in the *Landy* case as Mr. Klinger has pointed out and I suppose I shouldn't try to characterize it but at least it's plaintiffs' argument that the Court in the case stressed use more than service. In other words, so that as I say, you can have different opinions, but in that case they did stress use more than the service.

In connection with the connection fee charges, the regulations provide for a fee of $1,500, and then goes on to say that that fee is if the connection is made within one year after the date of availability of the sewerage system to the premises, and then further provides that if it is not connected the first year of the date of notification of availability, then the charge goes up to $3,000, double, and if not connected within the third year after the notification of availability, it goes up to $5,000, or more than three times the original cost. To me, that is a penalty. There is no relationship. I cannot see how there could be. There is just no relationship because there are remedies. If there were no remedies, if it were solely within the owner or user to connect, and there's no remedy that the municipality had, then it may be that this might be deemed reasonable in order to make up for the loss of the other charges made, the capacity and the use charge, and I could understand that might be reasonable, but not in this case, because there are facilities or procedures that are available to the municipality or the Sewerage Authority, and it may just be the municipality. I read your briefs on it, and it seems to me it doesn't make any difference whether it is the Authority or the municipality, but there is a remedy to require the owner or user to connect. The statute in connection with the connection fees is very liberal in this sense, in that it provides that—that is, the statute provides that in addition to any such periodic service charge, a separate charge in the nature of a connecting fee or a tapping fee in respect of each connection of any property with the

sewerage system, may be imposed upon the person seeking such connection or upon the owner or occupant of the property so connected. Such connection charges shall be uniform within each class of the users, but the amount thereof shall otherwise be entirely within the discretion of the Authority in order that the combination of such connection fee or tapping fee and the aforesaid periodic service charges shall meet the requirements of Sub-Section C hereof, meaning that the Sewerage Authority has great discretion in determining what that amount will be, and I would have difficulty in this case, and there is not proof, shall I say, to the contrary that $1,500 is not reasonable. That is, there is no proof it is not unreasonable. It could be a reasonable charge to an industry and, I suspect—I don't know—but I suspect that is not really what the plaintiffs are contending in the case by reason of the manner in which the case was presented. I don't believe this was really an issue in the case, but rather the penalty clauses were, so I do find the penalty clauses to be invalid, but that does not disturb the $1,500 fee which may be lowered or raised within the limits provided by the law.

For example, suppose they had said initially, "We charge $3,000," and no proof to the contrary, I would find that is reasonable. It doesn't make any difference whether it was fifteen or three, because in the final analysis the statute recognizes that this fee would be based on the amount of money that the Sewerage Authority needed to meet the requirements, to meet all of their debts, and also, of course, to meet the requirements of the following Section C, but, as I say, I have said I find the fifteen hundred dollars at this time to be reasonable, but the other sections increasing the fee for failure to connect within one year to be invalid.

I have determined—perhaps I have not stated it clearly, but I have determined that the capacity charge of 10.5 cents per square foot based solely upon the square foot

area of the building, keeping in mind the fact that it was also related to the annual—or the debt service, and its effect thereupon, upon the users and owners of the properties, is not equitable—is not equitable—it may be practicable from the standpoint of administering, but it is not equitable, and, therefore, this, of course, would mean that I do not necessarily find the use charge invalid, because certainly the cheaper the charge the less objection the payer would make, but you are confronted here obviously and clearly with the fact that the Sewerage Authority must raise a certain amount of money, and nobody questions the fact that it is their duty under the law, and to the bond holders, to raise the money, and if it is necessary in order to make for an equitable solution, to require those who use the sewerage who actually have a flow in excess of others, to have that raised a little higher, if this system is to be used, then that would have to be done.

On the other hand, the statute provides for various alternatives, and it is not the function of the Court to revise the schedule. That is not within my jurisdiction. So it is not to be taken by anyone as any order on the part of the Court to revise the capacity charge or the use charge. As I suggested, it would be more equitable, but rather just to indicate the reason for the inequitableness or the inequity of the charge based upon greater emphasis being laid upon the square foot area of the building as it relates to capacity, to sewerage charges, that is, sewerage charges based upon capacity, because that's what the sewerage charge is, a fee. The 10.5 cents on the square foot of the building, and that is referred to as the capacity charge, and there is no other provision in the statute referring to that word, "capacity," other than that which I referred to—that is, for example, the statute does not say that the Sewerage Authority may as an element or as the only element base its charge on the square footage of the build-

ing. It does not say that. Instead it says, "On the capacity of the improvements on or connected with the real property."

What do we mean by the capacity of the improvements on or near the connected property? Does that mean the size of the building or does it mean the capacity of the improvement as it relates, as that relates to the matter involved, sewage. That's what is involved, and it seems to me that is the better definition of capacity in a case such as this.

Of course, I understand that defendants' expert—I understand his argument, and I understand his reasoning. He says if you have a big building, well, the potential is there for more sewage. But is that so? And is it practically so? I say if you had all of one kind of building, there is no problem. If you had all hotels, if you had so many rooms, had so many toilets, you could do that. Square foot area would be a good test there, it would seem to me. At least, I think so, I don't know, there was no testimony as to a hotel. But when you begin to get into varied types of buildings it is difficult, but nevertheless, it is the duty to arrive at an equitable result even though it may be difficult, and in my opinion, as I have stated, it is not an equitable result as provided for in the regulations of the Carlstadt Sewerage Authority to charge 10.5 cents per square foot of the building constructed, because it results in numerous and wide discrepancies and you will have to come up with something that will, in some respects, be equitable and, of course, that is a general term as I defined it to you from Black's Law Dictionary. It is something that is just and fair, and you can't set it forth with exactitude.

I have received from Counsel for the parties, at my suggestion, and I do not say request, because I didn't want to impose any duty on Counsel, but they have, just as they have very carefully and thoroughly tried the case, and submitted adequate briefs, all of which has been of help

to the Court, they have also submitted requested findings of fact and conclusions, and I will go over them, and to the extent that I can, I will make such findings of fact, even though I already have made findings of fact, I believe, on all the issues in the case, but it may be that for Appellate review, because I may have assumed some things instead of making the finding of fact, that I will try to make these findings of fact in order that the case will be better documented for Appellate review.

The Court finds as a fact that the Borough of Carlstadt created the Carlstadt Sewerage Authority by ordinance, June 21, 1967, pursuant to the *Sewerage Authorities Law of 1946, R.S. 40:14A-1, et seq.*

The Court finds as a fact the plaintiffs are owners or occupants of real property in the Borough of Carlstadt who devote such property to commercial or industrial use.

The Court finds as a fact that the owners and occupiers of real property within the Borough of Carlstadt in an area within that Borough generally west of Berry's Creek receives sewer service from the Borough and treatment thereof by the Joint Meeting of Rutherford, East Rutherford, and Carlstadt sewage treatment facilities without any direct charge to them for said sewer service. The cost of sewer service being—taken up within the general tax rate, tax rate and taxes of the municipality. That is, the sewer facilities and the operation are paid for by owners of property throughout the entire Borough of Carlstadt and not just the portion west of Berry's Creek.

The Court finds as a fact that the Carlstadt Sewerage Authority has commenced the construction of a sewerage system within the Borough of Carlstadt intended to serve a portion of that Borough consisting of approximately 650 acres in an area generally east of Berry's Creek. Such system is being constructed in two stages designated as Stage I and Stage II.

Appendix A

And, of course, the Court finds as a fact the Sewerage Authority did adopt a schedule of sewer service charges and revised said schedule of sewer service charges on April 11, 1968, and it isn't necessary to read into the record that finding. It's in De-3. I do not have the exhibit numbers. It is in D-3.

The Carlstadt Sewerage Authority contends that a portion of its sewer system was available for connection by owners or occupiers of real property in the Stage I area on or about November 1, 1968. The Stage II area is not available for connection.

The plaintiffs contend that they are not connected—that is, except as to those which are admittedly connected and as to which there is no issue, those that are not actually connected, the plaintiffs contend not being connected to the system on that date, November 1st, 1968, or any subsequent date, that they derive no sewer service or use from the Carlstadt Sewerage Authority except since the date of connection as aforesaid, and I have already found as a fact that there is no basis in the statute for any increase in the charge or any reference to it as a "penalty" for failure to connect within the specified one-year period.

And I have already determined that the so-called "capacity charge" of 10½ cents per square foot of the building is not reasonably proportional to the service and use charge, and, in fact, that undue emphasis has been placed upon the capacity charge in setting the rate so as to be inequitable to those who have larger buildings, but no sewage use related to the size of the building.

The so-called "capacity charge" of 10½ cents per square foot of the building imposes unequal disparate charges upon the users of the sewer system not related to and having no connection with sewer service or use to said users.

Now, I have been asked to make a finding of fact with respect to making allowance for commercial use of water, and in view of my opinion, it would seem to me that it is not for this Court to make a determination as to how the rate will be set, as long as they use the factors in the statute; as long as that is equitable and it may not necessarily be based upon making allowance for commercial use of water, even though that would be reasonable, and the statute says that can be—it's obvious that under the law this would be a permissible allowance to be made, but, of course, this complicates the administrative procedure. This, I suppose, would go for practicability. How can you police this properly? How can you regulate it? So that I can't make that finding of fact. I would like to make a finding wherever I am asked, but I do not see how I can make such a finding of fact, but, nevertheless, I have commented on it. That's the finding I can make, but not a finding of fact, and, similarly, with respect to the charge as to waste or sewage treated (meaning special treatment thereof) and in fact there has been evidence as to some consideration being given to additional charges due to special treatment. So I don't make that as a finding of fact.

I believe I have already stated that the fact that no sewer charge is made to those in the westerly portion of the Borough is not to be deemed as unconstitutional in not treating each of these parties equally under the law—that is, those within the new sewerage area and those within the new sewerage area and those within the old sewerage area. And the request was made that I make a finding that the sewer charges are not uniform. Well, obviously, if you don't pay anything and if someone does, it is not uniform, but I've also ruled that because of the *Jersey City versus the Housing Authority* case, which I have referred to, that our Supreme Court had that factual issue before them and made no determination other than

by the manner in which it stated—it indicated that no—presumably no charge is being made to those who are using the old system, just as in the *Carlstadt* situation, and I am referring to that statement of the Court wherein it stated, "Nowhere in the agreement is there a provision for the charges for the operation and maintenance for any part of the old system which presumably still offers the service free of charge to all property owners, including Housing, without discrimination."

In other words, it is uniform insofar as the old system is concerned, and nobody is complaining in the westerly portion of the Borough of any lack of uniformity in not paying any money.

Insofar as the issue of availability on November 1, 1968, I have indicated what my opinion is and I will state it more specifically, that there is provision under the statute whereby a municipality—and as I say, I use the term "Municipality" and the term "Sewerage Authority" alternately, because my attention has been directed specifically to which one may do so, but the proposed users of the Sewerage Authority are required to connect. It has been established. It has been admitted that the area in question is polluted and will become more polluted, and will become more polluted as more industry settles, and certainly you don't have to wait until you die before you correct a situation. You do not have to wait for the disease to happen. You anticipate it. It does exist. Complaints have been made, some of the industries in question had previously been directed to set up their own sewerage plants because they couldn't exist under the present situation before the sewerage was established, so the necessity therefore is not disputed. I know Counsel for the plaintiff has so stated, and that is not an issue in the case, but the defendants contend that because the owners were notified that the system was available for use, that therefore they were under a duty to connect, and, of course, we now know

that there were various reasons why connection was not made and cost was the factor—that is, the charges. It would seem to me, therefore, that this Court should not order or make an order requiring payment by any of the industries during the period that they were not connected. However, there has also been testimony as to how long it would take to connect, subject only to the availability of labor to perform it, and that I am not familiar with, and as to that I will accept the stipulation, if it can be made, of time, not a stipulation that you will connect, but a stipulation, because you may appeal from the decision, but I will make an order, and I would like any suggestions from Counsel as to the time needed, if they do intend to, what would be a reasonable time. May I ask that? You understand, now, I am not saying you must connect, because you can appeal from it and you don't have to, but if you don't connect, then you will be subject to, perhaps, contempt. I am not going to rule on that. I am inclined to feel perhaps not—I am inclined to feel you may have to proceed, but your procedure may be shortened somewhat by the order of the Court. Again, I am not going to determine the effect of the order. You must follow the statute.

Mr. Porro: This may not be known to the Court, but there are cases pending in the Magistrate's Court which started simultaneously with this one.

The Court: I heard during the course of the trial—

Mr. Porro: And we held back prosecuting the case pending the disposition here.

The Court: I am not deciding that case, because there again the Court has no right if someone came in to enjoin the Magistrate's proceeding. I won't enjoin it. I would say take your appeal from the Magistrate's opinion if you are unsatisfied with it. So I am not going to rule on it.

Mr. Porro: We withheld proceeding voluntarily.

The Court: But you still can.

Mr. Porro: We can move those cases.

The Court: Where it will get you, I don't know. Then there are appeals from that, just a matter of being nasty. Now, it may be you shouldn't proceed with that. I am not going to tell you one way or the other. I am not saying you should or should not.

Mr. Klinger: In regard to connection—

The Court: Time.

Mr. Klinger: Yes, on January 31, 1969, I, on behalf of the plaintiffs in Stage I, stipulated that we would take all action necessary to connect, with the stipulation of the Sewerage Authority that permits would be issued without the payment of the $1500 connection fee. Plaintiffs have proceeded to connect. They have not connected, because we have encountered administrative difficulty with a number of plumbers.

The Court: That is no problem. Can't you give some date now?

Mr. Klinger: Let me say, since January, all of my clients have informed me, and I have 81 clients, and 43 of the—

The Court: I can't rely on what they have informed you.

Mr. Klinger: All I can say is we have been attempting to achieve these connections.

Mr. Porro: I would like to say for the record that we completely dispute the statement Mr. Klinger put on the record. We have not only cooperated, but looked away from regulations that we had, to make it easier for him, and open up to any plumber, and no question in my mind that they have been intentionally withholding connection.

The Court: This order I am making of 30 days. This order I am making is subject to the effect of any other statute by reason of which you are permitted to proceed against the property by way of an assessment and maybe that's what you should do. I think you owe a duty, also, because if you come in with, "Judge, I want to hold him in contempt," I'm going to ask you the question, "What did

you do about it? And you will say, "I didn't do anything. I waited." Then I will ask you, "Why did you wait?" If you see no signs of it, will you proceed? If you are authorized by the municipality, as I say, I am not sure whether the Borough Attorney or you will do this. Now, you can review that law and proceed on that—whoever the plaintiffs should be in the case, it is probably the municipality, I would think, because they would be the ones that would get a lien on the property.

Mr. Klinger: So I understand, sir, within the order that will embody the judgment, will be an order for the plaintiffs to connect within 30 days of the order?

The Court: Of course. Then it brings up another problem I am not going to solve at this time, that is, what rate they will pay. I understand that problem, but that's simple, not complicated. Within a short time the Authority is going to revise their schedules. That is what I ordered. There will be a revision of schedules and they can do that fairly promptly. They have got most of the survey material. Just a matter of now making another—I do not want to say this—if I say guess—but another good estimate, and then it would seem to me if you are unhappy with that, you are going to appeal everything; you are not coming back here, because some question—I discussed the question of what procedure you follow. If you do this, some question about retaining jurisdiction, and I am not going to retain jurisdiction. There is no necessity to retain jurisdiction. If you are unhappy, can't solve it, then you appeal it. I am hopeful that you can solve it. If you are reasonable, you are going to work something out, even though you may not completely be satisfied that the Authority has done the best they can. I know they want to do their best. They would even be willing to take suggestions from the owners of the land, but plaintiff's attorney himself couldn't make any suggestions, at least he didn't wish to.

May be an idea. I say this is not the order of the Court. Maybe under the law, maybe you would be required to hold a hearing. As I required, there was provision for the holding of a hearing as to rates. However, you will comply with the law as to that on whatever notice is necessary.

In other words, I am not giving the Sewerage Authority any instructions that will take away from them the power that they have. They have these powers and they have the right and the duty, the responsibility of exercising those powers.

I also find that the parties are not—that is, the plaintiffs are not barred by reason of time or any of the rules in bringing this suit. I am asked to make a finding as to the reasonableness of the rate schedule, and despite my suggestions to Counsel, and at his insistence that he is not questioning the reasonableness, I still feel, however, that I will not make such a ruling. It is unnecessary. It has nothing to do with the case, but it goes to the question of equitability, and I have so ruled on that, because if something is unreasonable, is it just? I don't see how it could be just and unreasonable. Is it fair if it is unreasonable? You see, you begin to get involved in semantics. I don't think it is. If it is unreasonable, it is not fair and just, even though plaintiff's Counsel thinks it is, I don't know, I don't understand that.

I have covered the issues as to polluters, that some of the plaintiffs are actual polluters, and some are polluters presently under investigation by the State Department of Health. I make that as a finding of fact.

I am skipping over some of the requests made by plaintiffs which, I think, I have covered. I am going to ask you when I am through whether I have, and if I have not, I will rule on it specifically.

The action of the Borough of Carlstadt in the creation of the Sewerage Authority and the vesting of jurisdiction to said Sewerage Authority for the separate sewerage sys-

tem east of Berry's Creek was based upon considerable and valid study, and does not constitute arbitrary action on behalf of the municipality nor the Bergen County Sewer Authority, and I believe I have also attempted to explain that which is sought, on which I have been asked to make a finding of fact, and that is the words "use" or "service" of the sewerage system as used in *N.J.S.A. 40:14A-B,* are not identical, and it was not the legislative intent to have them treated as one and the same, the subsequent factors listed as the basis for computation of the charge relating to use or service.

The words, "use" or "service," meaning the actual use of the facility, such as the actual flow of sewage emitted therefrom, and the word service meaning the availability of the facility and the capability or potential use thereof, whether or not the same is utilized or is, in fact, partially utilized, and although I have determined the fact that the formula used of 10½ cents per square foot of building area is not equitable, I have determined that a charge for capacity use or service charge is proper. It must be a reasonable apportionment of them.

And I have held that because Sewerage Authority did not properly apportion the charges so as to be equitable under the circumstances. The capacity charge of the Sewerage Authority being based on the square footage of a building is not properly factually related to the statutory basis and language of capacity of the improvements on or connected with the real property as set forth in E.S. 40:14-8B, insofar as it relates to sewerage, when used in such proportion as to—or when applied in such proportion as to place greater emphasis upon the service use rather than as compared to the actual use of the sewerage facility.

Except as already noted, the rates and charges insofar as the residential users or property owners are concerned, has not been challenged and is deemed to be uniform and practicable and equitable, again keeping in mind the pen-

alty provision is deemed—the penalty provision in relation to connection fee is deemed invalid, but in all other respects is valid, but, of course, this is not to be taken as any indication that because of any rescheduling of fees or charges, that the residential fee may not also be changed, because the Sewerage Authority does have that right, and it may be that it may be necessary to alter those charges in order to meet its needed financial needs.

I believe I have covered everything, including the separate defenses. However, I wish before we leave, even though it is late, could you just look over your own requests, and I would like to hear from you as to whether you wish to have the Court make any other findings of fact or conclusions of law on any matters as to which I have not already ruled.

In other words, I do not want the subject to come up later that we need certain findings of fact. I've tried to cover them all.

Mr. Klinger: I have no suggestions as to any findings of fact. The one area, and I think the Court has inferentially expressed itself already, is that in regard to the plaintiffs' counterclaim for damages, I take it that that is denied.

The Court: I presume the damages were the fees—that is, the charges, beginning with November 1st, and I have ruled that the Borough must do more than just send a notice; that it requires them—that is, the law has given to the municipality the teeth to perfect whatever right they have. They just can't sit by and wait, otherwise that would be what they would always do, sit by and wait. Time would go on, get paid the minimum fee whatever it is for connection charge, or the fee based on the square footage of the building, when, in fact, in all fairness they should take definite steps, particularly while there is litigation pending, to require the connection under the particular statute that's available to them, but now I say in order to af-

ford relief from the defendants who, I understand, have a problem, and you should understand, have the problem of meeting their indebtedness, their bonded indebtedness, their operational expenses, to the extent that the Court can, I will aid. I say to the extent that the Court can. If you want to risk the contempt charge, that is your risk. We will proceed. I don't have the power. I don't have any brief on the point, and it would seem to me, being a Court of Chancery, there certainly should be some power in the Court to require one who ultimately must connect to connect, because whatever the rate will be, it can be adjusted proportionately, and as of the date that is, it can relate as long as they have had a use. So the quicker you get the use, the quicker they get their money.

Mr. Klinger: I wasn't suggesting any position of the plaintiff. I was merely trying to understand. As I understand what the Court has said, that it has ruled insofar as the counterclaim of the defendant that the plaintiffs are going to be directed to, within 30 days of the order, to connect to the system.

The Court: Period. No damages.

Mr. Klinger: Without further damages?

The Court: That's right, because that will then depend on the statutory relief, and whatever relief can be had by way of a contempt proceeding, or—I don't know how I can make you do it other than by a contempt—I am trying to think how I can make you do it?

Mr. Porro: We have remedies to go against the property which would be the practical mode that we would take.

The Court: This is what I have in mind. Therefore, I would—I said I would ask you the question if you came in and asked for a contempt order, I would say, "Well, what did you do about it?" You can't just sit down and wait—

Mr. Porro: I mentioned it, because it would be moot. We would go against the property.

The Court: Ultimately, they have to connect up. As far as payment is concerned, that's another question. I can't rule on it. I don't know what the rate is, but you know someone had to ask that question in the course of the trial about how you need the money, and you can't have all this time, but my thought on it is, within the limits prescribed by law for notice, if notice has to be given, seven days notice, whatever this is, you will be acting on this right away. This is important, and you are going to meet and you are going to have your engineers there, you are going to have your Borough Engineer, and then pick another rate, do the best you can, and I can't tell you what it is. If I could, I could say—in other words, it might be better if the Court could say this would be the rate. At least it makes it easier. Even if I am wrong, then you appeal it. I can't help you on that. I can't suggest what the rate would be. I can just tell you it is inequitable now.

Mr. Porro: I think the question is more not as to what the rate is, but as to the time for them to start running.

The Court: It may be 30 days. That's the very point. If, under the law, I've told them now the order will contain an order within 30 days, they take the risk. I can't say—I can't try a case now as though there had been a violation to determine that my order is a valid order, and there is some question in my mind because of the availability of the statutory relief. That's the point. In other words, this is not a case where necessarily there is no legal relief when you come to equity, but it may be in this kind of case I think they ought to get connected within 30 days, and if they can't, they ought to call it to your attention, and if they can't get plumbers, maybe you can help them get plumbers.

Mr. Porro: That's a farce.

The Court: But assuming they say that, you will send them 22 plumbers—

Mr. Porro: You can bet.

The Court: That's the point. Then they'll have to take one of them. I think it will all come out in the wash—I was going to say sewer—but—

Mr. Porro: We have a number of industries that have connected and we are going to be confronted with the question, and perhaps we shouldn't even raise it—

The Court: What is that?

Mr. Porro: There are industries that are connected that have paid.

The Court: Yes. I understand the problem.

Mr. Porro: We are going to pass the new schedule and have to make adjustments.

The Court: It may create a problem, but in the final analysis it will be a problem administratively and collecting more money, though someone who didn't pay would have to pay more, some less, and then the Authority shouldn't be permitted to profit by it or lose by it. It is an administrative problem.

Mr. Porro: I know there are some going to be confronted with paying more.

The Court: That's the point.

Mr. Porro: And then there will be some adjustments. Mr. Klinger has raised the issue in this case that we have no power to make adjustments or credits for people that have already paid rates.

The Court: That's another question.

Mr. Klinger: That's my opinion.

The Court: It reminds me—we do the best we can. This one man, one vote rule, what developed from it, you changed the districts, the number of senators, changes in the area sometimes referred to but not stated by me to be gerrymandering, that type of thing.

Mr. Porro: The fact as to that question, does the Court feel it is in its domain the make a ruling on that?

The Court: I don't believe it would be proper. These are not properly before me.

Mr. Klinger: I don't represent—

Mr. Porro: Oh, yes—

The Court: Not on this issue. It is a problem and it may end up in a lawsuit, but I can't avoid that.

I believe I have covered everything, and it would seem to me even though my opinion has been a rambling one, I felt I understood this case. I felt I would understand it through the competency with which you gentlemen presented this case, and the nature of the witnesses. It made it simpler for the Court to give its opinion. Whether you agree or disagree with it, I feel I did understand what is a further complicated—

Mr. Rudolph: If your Honor please, you haven't touched on the issue of—

The Court: With respect to Pur-All—

Mr. Rudolph: We haven't given you any formal requests. The only thing I might say is that you take the statement of facts that we have appended to our brief, and the only other request—

The Court: I can boil them down pretty much in holding that as to the case of the plaintiff, Pur-All, I find that at this time the municipality, having given Chal-Bro and Pur-All the permission to connect at their own expense, and they having so connected to the Moonachie system, a separate sewerage system, and there being no proofs at all that any pollution exists because of it, but that it is being adequately seweraged or drained, and that the sewerage was adequately provided for, that it would be unfair and unjust to require the plaintiff to remove its connection from the Moonachie sewer system and to join the Carlstadt Sewerage Authority system, and when I nonchalantly—I suppose I asked Counsel—it wouldn't make

any difference to you whether you joined the Carlstadt Sewerage system as long as you suffered no loss, the statement was made that, "Well, we won't join it, because we can get cheaper service from Moonachie," but I don't think that would be a valid argument, and I state this because my decision that—holding in favor of the plaintiff in the case is solely with respect to the requirement that they join the Carlstadt Sewerage Authority without anything else, no damages, nothing paid, but if on the other hand the Carlstadt Sewerage Authority certainly made an offer to take care of the actual assessment, and whatever interest. I suppose, I don't know, what would be equitable there, it is not before me, this would be obviously worked out. Another issue would be presented.

Now the Sewerage Authority may decide not to bother, but if it is necessary, it would seem to me it's within their area and that they can easily disconnect. The only problem is money and the defendant bears the cost of that; I don't see why Pur-All shouldn't join.

Mr. Rudolph: Your Honor, the other—

The Court: My ruling is in favor of the plaintiff that insofar as under the present set of facts are concerned you are not required to join, but this is without prejudice to the Carlstadt Sewerage Authority making a further application based upon the reimbursement to Pur-All of the costs and expenses incurred, or damages, of its damages, by reason of the prior connection.

Mr. Rudolph: Is the Court referring to what they referred to, what it cost them to connect to the other system?

The Court: Yes, I was referring to the fact that he said that he wouldn't join for another reason, it's cheaper. That's not exactly a valid reason.

Mr. Rudolph: The other request that I was going to make regarding the facts is that there is nothing that shows that the permission that was granted was contingent

upon Carlstadt establishing a sewerage authority, and at that point we would be required to join into Carlstadt. It was—

The Court: The resolution is in evidence. It speaks for itself. It's in evidence. There is no statement in there that it is contingent on anything. At that time it was like deciding—it might be unusual. Maybe some people do, nobody thought about it yet, nobody thought about the fact that there was going to be a Sewerage Authority at that time. Maybe they were thinking, but at least nothing was done.

Mr. Klinger: We will order a copy of the opinion, sir, and submit a judgment in due course. It will be about a week, I guess, you know.

The Court: If you could dress it up a little bit, it would be better. I have given it as an oral opinion. I felt if I had to write a written decision, you wouldn't get a decision for two or three months.

Mr. Porro: We would like to thank the Court.

The Court: Well, I wish that both of you had won, and I don't know which one of you did.

APPENDIX B

(Opinion of the Supreme Court of New Jersey)

SUPREME COURT OF NEW JERSEY

A-151 September Term 1969

—o—

AIRWICK INDUSTRIES, INC., ET ALS.,
Plaintiffs-Appellants,
Cross-Respondents,

v.

CARLSTADT SEWERAGE AUTHORITY, ET ALS.,
Defendants-Respondents,
Cross-Appellants.

—o—

Argued June 1 and 2, 1970—Decided October 26, 1970.

On appeal and cross appeal from portions of Final Judgment of the Superior Court of New Jersey, Chancery Division, Bergen County.

MR. ALLAN H. KLINGER argued the cause for plaintiffs-appellants, cross-respondents (MESSRS. CALISSI, GELMAN, CUCCIO and KLINGER, attorneys).

MR. ALFRED A. POBRO, JR. argued the cause for defendants-respondents, cross-appellants (MR. ALFRED A. POBRO, JR., attorney for defendant-respondent, cross-appellant, Carlstadt Sewerage Authority; MR. GENE N. SCHIFFMAN, attorney for defendant-respondent, cross-appellant, The Borough of Carlstadt).

The opinion of the Court was delivered by HANEMAN, J.

This appeal concerns the extent of the area of the Borough of Carlstadt (Carlstadt) over which the Carlstadt Sewerage Authority (Authority), created under *N.J.S.A.*

40:14A-1 *et seq.*, has jurisdiction and the legality of the sewerage rates set by said Authority.

In 1938 Carlstadt by contract with Rutherford and East Rutherford created a "Joint Meeting," for the purpose of collecting and treating the sewage from the western section of the three Boroughs." See *N.J.S.A.* 40:63-68 *et seq.* The Joint Meeting constructed a sewage treatment plant between the years 1939 and 1941. The users of the sewer service are not directly charged for such service, the cost of operation, maintenance, etc., being distributed among the three municipalities. The proportionate share of Carlstadt is absorbed by revenues raised by general taxation.

The eastern section of Carlstadt is largely "meadowland," which for years remained undeveloped and unsewered. Due to recent rapid development, largely industrial and commercial, it became apparent that some general system of sewage disposal was required to avoid the imminent danger of water pollution. Accordingly, Carlstadt obtained field investigations and studies from a firm of consulting engineers. As a result, Carlstadt determined that the method of sewage disposal in that section was inadequate. It also concluded that sufficient addition to its present system or construction of a new system would create an almost insuperable municipal financial problem. The Borough, therefore, created the Carlstadt Sewerage Authority. See *N.J.S.A.* 40:14A-1 *et seq.* On July 1, 1967, Carlstadt entered into a service agreement with the Authority. In this contract the word "district" is defined, using the language of *N.J.S.A.* 40:14A-3, as "the area within the boundaries of the Borough." However, the system which the Authority was to finance and construct was referred to in the contract as "for the use of the residents and inhabitants of a *portion of the* Borough and for the collection and disposal of certain sanitary sewage and other wastes arising within a *portion* of said District." (Emphasis supplied)

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The planned system includes the construction of collection sewers, pumping stations and force mains to connect with the sewerage system of the Bergen County Sewer Authority which ultimately treats the sewage in its treatment plant in Little Ferry. The scheme for establishment of the sewage collection system by the Authority contemplates construction in two stages to serve approximately 650 acres of the Borough. Stage I is designed to serve approximately 200 acres, containing some 55 industries at its inception, but to ultimately serve 90 industries. Stage II will serve approximately 450 additional acres, with 63 industries to be served initially and 220 industries ultimately.

The system was constructed with funds obtained from the proceeds of a bond issue of the Authority in the amount of $5,800,000. The construction of the system was completed and allegedly available in Stage I on November 1, 1968.

On July 27, 1967, the Authority adopted a "Schedule of Sewer Service Charges" which schedule was revised on April 11, 1968 to provide the following charges:

"SCHEDULE OF SERVICE CHARGES

Nature of Charge	Industrial-Commercial
Connection Fee:	$1,500.00 if connected within one year from the date of availability of said sewerage system to the premises; $3,000.00 if connected within the second year of the date of notification of availability; $4,500.00 if connected within the third year of the date of notification of availability; $5,000.00 if connected any time after the third year of notification of availability of said sewer.

Appendix B

	Residential
	$150.00 if connected within one year from the date of availability of said sewerage system to the premises; $300.00 if connected within the second year of the date of notification of availability; $450.00 if connected within the third year of the date of notification of availability; $500.00 if connected any time after the third year of notification of availability of said sewer.
Capacity Charge: (Per Annum)	Industrial-Commercial & Residential
	10.5 cents per square foot of building constructed on premises being served or available to be served; a minimum capacity charge of $150.00 per year shall be charged.
Use Charge: (Per Annum)	Industrial-Commercial & Residential
	$1.00 per thousand gallons."

On November 1, 1968, the Authority rendered bills for sewer servicing in accordance with the above April 11, 1968 revised schedule to all plaintiffs located in the geographic area served by Stage I.

41 of the 160 commercial and industrial users brought the present declaratory judgment action, contesting the validity of their sewer bills. Judgment was entered favoring in part both plaintiffs and defendants.

Plaintiffs appealed and defendants cross-appealed from portions of the judgment. Plaintiffs' motion for certification to this Court before argument in the Appellate Division was granted. See *R.* 2:12-2(a).

So much of the judgment as is here involved concerns the adjudication that (1) It was within the power of the

municipality to set up the Carlstadt Sewerage Authority within an area constituting only a part of the Borough. (2) A charge based on "capacity of improvement," *i.e.*, area of building, was improper due to the fact that it was not proportional. (3) The connection fees were valid only to the extent of one charge of $1,500 and annually increasing connection charges were invalid. (4) The plaintiffs were not estopped or barred by laches.

We shall consider the issues in the order above set forth.

I.

DOES THE DIVISION OF THE MUNICIPALITY INTO TWO SEWER DISTRICTS VIOLATE THE TERMS OF N.J.S.A. 40:14A-1 ET SEQ., AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

N.J.S.A. 40:14A-3(6) provides in connection with the definition of 18 separate words and phrases:

> "As used in this act, unless a different meaning clearly appears from the context:
>
> • • •
>
> "(6) Subject to the exceptions provided in section four of this act, 'district' shall mean the area within the territorial boundaries of the county, or of the municipality or municipalities, which created or joined in the creation of a sewerage authority;"

Plaintiffs argue that this statutory definition connotes that the jurisdiction of a Sewerage Authority encompasses the entire area of a municipality creating such an Authority, and that such an Authority has the sole right and

duty to provide for sewage disposal within the municipality. From this premise they spring to the conclusion that the Joint Meeting no longer has the right or power to function in the western section of Carlstadt and that the sewer service in that portion of Carlstadt must be furnished by the Authority. They also conclude that Carlstadt may no longer constitutionally pay for such service out of general taxation but that the individual users of the system must pay the Authority. They do not suggest how or by what statutory authority the Joint Meeting can function under its tripartite contract absent any service to or financial participation by Carlstadt, nor what portion of the Joint Meeting debt, if any, is to be assumed by the Authority, nor how and for what consideration Joint Meeting and Carlstadt are to transfer the existing sewer plant, lines and equipment.

They cite as a decisional support for the above, *Santoro* v. *So. Plainfield*, 57 *N. J. Super.* 307 (*Law Div.* 1959) aff'd 57 *N. J. Super.* 498 (*App. Div.* 1959). It must be remembered that what the court there said was articulated in connection with the facts there present. Involved, was not the question, as here, whether a municipality may, after creating its own sewer authority, continue to participate in the operation and maintenance of an existing sewer system in part of its territory. Rather, the inquiry was whether a municipality, having created a sewer authority, could subsequently construct a sewer system of its own without the consent of the authority. The court held, quite properly, that the municipality could not undertake this latter action in the light of *N.J.S.A.* 40:14A-29 which reads:

> "No sewage disposal plant or other facilities for the collection, treatment or disposal of sewage arising within a district shall be constructed unless the sewerage authority shall give its consent thereto and approve the plans and specifications therefor."

It is seen that the cited case is no authority for plaintiffs' proposition.

Kline v. *Bellmawr Sewerage Authority,* 55 *N. J. Super.* 153 (*Ch. Div.* 1959) aff'd *sub nom Landy* v. *Bellmawr Sewerage Authority,* 61 *N. J. Super.* 396 (*App. Div.* 1960), also cited by plaintiffs, is no authority for their argument. In *Kline,* the municipality created a Sewerage Authority to which it "donated the [existing municipal] plant, mains, laterals, rights of way, and pumping stations and equipment," as it had the power to do under *N.J.S.A.* 40:14A-22, intending that the sole agency for sewage disposal should be the Sewerage Authority. The question of exclusive jurisdiction was not an issue.

That *N.J.S.A.* 40:14A-1 *et seq.* did not intend that the Authority must supersede and succeed to an existing municipal sewer system is borne out by the various sections which (1) make it *permissive* for the municipality to "sell, lease, lend, grant or convey * * * all or any part of any system of main, lateral or other sewers or other sewerage facilities" to a Sewerage Authority (*N.J.S.A.* 40:14A-22); (2) authorize a municipality to enter into a contract with a Sewerage Authority for "the treatment and disposal of sewage originating in the *district* or in such municipality by means of the sewerage system or any sewerage *facilities of such municipality* or both" (*N.J.S.A.* 40:14A-23) (Emphasis supplied); (3) authorize the Sewerage Authority "to enter upon and use * * * any existing public drains, sewers, conduits, pipe lines, pumping and ventilating stations and treatment plants or works or any other public property of a similar nature within the district" with the restriction that "No sewerage authority shall, however, take permanent possession or make permanent use of any such treatment plant or works unless it acquires the same." (*N.J.S.A.* 40:14A-25). Implicit in the foregoing is an intention to permit the continuance of an existing system and a recognition of the municipal

power to continue to operate a system until voluntarily relinquished.

The following portion of the Statement of Purpose attached to the bill which became *N.J.S.A.* 40:14A-1 *et seq.* further supports the conclusion that no abolition of extant services was intended:

> "Another such *optional provision* would permit an arrangement whereby the authority, on *mutual agreement* between it and the municipality, would take responsibility for operating the entire sewer system of the municipality, *or some part thereof*, and assume all or part of the existing sewer debts of the municipality, thus further relieving the tax burden." (Emphasis supplied)

It is, therefore, concluded that the legislature intended that the municipality have the power to create an authority to service any portion of the municipal territory and that where a sewerage system existed in some other portion of the municipality at the time of the creation of the Sewerage Authority, that system may continue to function and the services rendered be paid for other than through the Authority.

Plaintiffs also say that:

> "Denial of sewer service to persons owning or occupying property east of Berry's Creek in the Borough of Carlstadt on the same terms and conditions as the sewer service rendered to persons owning or occupying property west of Berry's Creek in the Borough of Carlstadt is a denial of the equal protection of the laws in contravention of the provisions of the Fourteenth Amendment to the United States Constitution, U. S. Constitution, 14 Amend."

By this argument, plaintiffs attack the payment of the costs of the Joint Meeting out of funds of Carlstadt raised by general taxation. Plaintiffs say that the money for the payment of these costs is in part absorbed by them through payment of their annual municipal tax levy. Accordingly, the actual users of the Joint Meeting sewerage system obtain the benefit of that payment while plaintiffs are simultaneously required individually to pay the Authority for their own sewerage systems. They conclude that the users of the Joint Meeting system are unconstitutionally favored.

In *N. J. Chapt., Am. I. P.* v. *N. J. State Bd. of Prof. Planners,* 48 *N. J.* 581, 601 (1967), cert. denied 389 *U. S.* 8, 88 *S. Ct.* 70, 19 *L. Ed.* 2*d* 8 (1967), this Court said:

> "The constitutional mandate for equal protection does not mean that the regulation must reach every class to which it might be applied—that the Legislature must regulate all or none. The Legislature has wide discretion in the creation of or recognition of classes for different treatment. Equal protection does not require that all persons be dealt with identically. If there is some reasonable basis for the recognition of separate classes, and the disparate treatment of the classes has a rational relation to the object sought to be achieved by the lawmakers, the constitution is not offended. The transgression arises only when the classification rests upon grounds wholly irrelevant to achievement of the State's objectives; the separate treatment must admit of but one conclusion beyond a rational doubt, *i. e.,* that the basis therefor is arbitrary and unreasonable, and without relevance to the legislative goal."

In *Walters* v. *St. Louis,* 347 *U. S.* 231, 74 *S. Ct.* 505, 98 *L. Ed.* 660 (1953), the court said:

> " 'Equal protection does not require identity of treatment. It only requires that classification rest

on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.' " (347 *U. S.* at 237).

So here, there exists a logical, reasonable basis for placing plaintiffs' lands in a separate class or category from those other Carlstadt lands being presently serviced by the Joint Meeting. Plaintiffs' lands are used largely for commercial and industrial purposes—the Joint Meeting services a section used largely for residential purposes. The section of the municipality here involved has within the past decade been converted from a desolate area to a highly developed industrial area. The lands within the Authority district are meadow and marsh land requiring a much more expensive sewerage installation and an increased disposal cost. Because of a lack of a common system of sewage disposal, this development was accompanied by the pollution of waters in, bordering and entering the sewerage district. Many of the owners of improved properties within the confines of the present section are present or potential polluters of said waters. Septic tanks have been disapproved and individual disposal plants commanded by the State Department of Health. Construction of individual plants is too costly to be feasible. Accordingly, absent the type of sewage disposal provided by the Authority, both the idle and the improved lands would become nonusable because of the prohibitive cost of individually complying with the requirements of the State Department of Health. The availability of the Authority sewerage system will result in a special benefit to and will enhance the value of lands to be serviced by the Authority beyond any incre-

ment which may thereby be enjoyed by the balance of Carlstadt.

Thus the classification of plaintiffs' lands rests on real and not feigned differences and the action of the municipality in making a special charge for sewage disposal is constitutional.

II.

WAS THE CHARGE BASED ON "CAPACITY OF IMPROVEMENT," I.E., AREA OF BUILDING, IMPROPER DUE TO THE FACT THAT IT WAS NOT PROPORTIONAL?

A "capacity charge," based on the area of the building alone, when employed as the sole basis of a sewer charge is invalid, as it does not bear the proper relationship to "type, class and amount of use and service." *N.J.S.A.* 40:14A-8(b). To that extent the trial court was correct. However, it does bear some relationship to those subjects and when combined in a formula which includes water consumption, constitutes one valid element upon which to bottom a charge. As so employed, the capacity charge is valid. We were informed at argument that the Authority has prepared a new schedule in the light of the trial court's opinion. The validity of the new schedule is not before us and we do not pass on that subject.

III.

ARE CONNECTION FEES IMPOSED ON AN ANNUALLY INCREASING SCALE ILLEGAL AND VIOLATIVE OF N.J.S.A. 40:14A-1 *et seq*?

The authority of the Sewerage Authority to "charge and collect rents, rates, fees or other charges," is governed

by *N.J.S.A.* 40:14A-8; *N.J.S.A.* 40:14A-8(b) (*L.* 1946, *c.* 138) provides in part.

> "(b) Rents, rates, fees and charges, which may be payable periodically, being in the nature of use or service charges, shall as nearly as the sewerage authority shall deem practicable and equitable be uniform throughout the district for the same type, class and amount of use or service of the sewerage system, and may be based or computed either on the consumption of water on or in connection with the real property, making due allowance for commercial use of water, or on the number and kind of water outlets on or in connection with the real property, or on the number and kind of plumbing or sewerage fixtures or facilities on or in connection with the real property, or on the number of persons residing or working on or otherwise connected or identified with the real property, or on the capacity of the improvements on or connected with the real property, or on any other factors determining the type, class and amount of use or service of the sewerage system, or on any combination of any such factors, * * *"

L. 1946, *c.* 138 was supplemented by *L.* 1968, *c.* 317, § 2 by adding the following:

> "In addition to any such periodic service charges, a separate charge in the nature of a connection fee or tapping fee, in respect of each connection of any property with the sewerage system may be imposed upon the person making such connection or upon the owner or occupant of the property so connected. Such connection charges shall be uniform within each class of users but the amount thereof shall otherwise be entirely within the discretion of the

authority in order that the combination of such connection fee or tapping fee and the aforesaid periodic service charges shall meet the requirements of subsection (c) hereof." *N.J.S.A.* 40:14A-8(b)

N.J.S.A. 40:14A-8(c) provides in part:

"The sewerage authority shall prescribe and from time to time when necessary revise a schedule of such service charges, which shall comply with the terms of any contract of the sewerage authority and in any event shall be such that the revenues of the sewerage authority will at all times be adequate to pay all expenses of operation and maintenance of the sewerage system, including reserves, insurance, extensions, and replacements, and to pay punctually the principal of and interest on any bonds and to maintain such reserves or sinking funds therefor as may be required by the terms of any contract of the sewerage authority or as may be deemed necessary or desirable by the sewerage authority."

L. 1946, *c.* 138 was also supplemented by *L.* 1968, *c.* 317 § 2 by the addition of the following:

"(d) Any county sewerage authority may establish sewerage regions in portions of the district. Rents, rates, fees and charges which may be payable periodically, being in the nature of use or service charges, shall as nearly as the sewerage authority shall deem practical and equitable, be uniform throughout the district for the same type, class and amount of use or service of the sewage systems and shall meet all other requirements of subsection (b) hereof." *N.J.S.A.* 40:14A-8(d).

It is therefore seen that the purpose of the annual charge is to raise a sum sufficient to pay (1) all expenses of opera-

tion and maintenance and (2) the principal and interest on any bonds and to maintain reserves or sinking funds for the funding of the Authority debt. The former of these items has its genesis in the actual use of the system for waste disposal. The latter has its genesis in the original construction and installation costs, for which the bonds were issued and sold. The principal and interest on these obligations represent that cost.

It is apparent that there should be two sources from which to raise the funds required for said purposes in order that the charges remain "equitable" and "uniform." Those properties actually using the system should alone absorb the cost of "operation and maintenance," since the expenditures for such purposes arise solely from that use. On the other hand, all properties, where service is available, whether actually using the system or not, should absorb the debt cost. The basis for this conclusion lies in the fact that the debt, as noted, represents the construction and installation expense, from which every property received some benefit and increase in value. Patently, part of the construction cost was necessitated by provision for adequate future service for unimproved properties as well as improved lands. It is conceivable that without the availability of an adequate sewerage disposal system that land might have to remain unimproved. That the actual users of the facility receive a benefit for which they should pay, is self-evident. It does not follow, however, from the fact that unimproved properties do not make any present use of the facilities, that they receive no present benefit therefrom. To the contrary, upon completion of installation, the unimproved properties also receive an immediate benefit from the mere availability of the system for service. All properties within the section serviced are beneficiaries of the expenditure—the improved for immediate present use and the unimproved for potential future use. Both classes receive an immediate enhance-

ment in value from the mere existence of the system. The only equitable manner to distribute the original cost, is for the unimproved properties to bear part of that cost in exchange for the increment in value received and for the potential standby service. It is certainly not equitable for the improved lands, during their use of the system, to pay the entire original installation and construction cost, thereby paying for the present and future benefit received and to be received by the unimproved properties as well. There are, therefore, two categories of properties which should be fairly called upon to pay for the original construction cost, *i.e.*, the improved and unimproved properties.

The periodic rent, rate, fee or charge provided by *N.J.S.A.* 40:14A-8(b) deals with the charge to be made to the actual user of the system and does not contemplate a charge made against unimproved property. Yet the unimproved property is benefited by the improvement, as above noted, and more specifically the unimproved property will benefit unfairly with respect to so much of the capital cost and interest thereon as may have been paid in the past by users of the sewer. The statute does not authorize a special assessment or any immediate charge against a non-user, but the statute by amendment does authorize "a separate charge in the nature of a connection fee or tapping fee," and further states that "such connection charges shall be uniform within each class of users but the amount thereof shall otherwise be entirely within the discretion of the authority in order that the combination of such connection fee or tapping fee and the aforesaid periodic service charges shall meet the requirements of subsection (c) hereof," which subsection makes provision for funds not only for maintenance and operation but debt service as well.

The logical construction of the foregoing subsections is that the legislature intended that the installation and construction costs, *i.e.*, debt service charges, should in the first

instance be financed by the actual users but should ultimately be borne by all the properties benefited, including the unimproved lands. For that reason there was provided a charge in the nature of a connection charge to be imposed upon unimproved properties in order that they assume a fair share of the original construction costs when they become improved properties.

The Authority may, therefore, include as part of the connection fee a sum of money which will represent a fair contribution by the connecting party toward the debt service charges theretofore met by others. The statute need not be read to require precise mathematical equality, but rather to contemplate rough equality, keeping in mind that we are in an area in which, as with respect to other tax impositions, absolute equality is neither feasible nor constitutionally vital. The Authority may, therefore, in its discretion, prescribe a schedule of connection fees escalating with the passage of time, requiring a potential user to absorb a fair proportion of the sum theretofore paid by the actual users for principal and interest on the bonds.

Presumably the Authority had some such thought in mind in creating a schedule of connection fees. We cannot know whether the schedule of connection fees was prepared upon this thesis and hence express no view with respect to its reasonableness, but we do disagree with the trial court's determination that a schedule of connection fees is inherently unauthorized. The Authority should have an opportunity to prepare a new schedule in accordance with above approach.

IV.

Were the Plaintiffs Estopped or Barred by Laches?

We find no merit in defendants' defenses of estoppel or laches.

Judgment modified in accordance with the foregoing.

APPENDIX C

(Judgment of Trial Court)

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION, BERGEN COUNTY

(Filed 7/9/69)

This matter having come on for trial before the Honorable Morris Malech, Judge of the Superior Court of New Jersey, Chancery Division, Bergen County, and said trial proceeding on June 9, 10, 11, 12 and 13, 1969, and the Court having heard and considered the evidence offered at said trial, and having received and considered trial memoranda from all parties, and having considered argument of counsel, it is on the 7th day of July, 1969, ORDERED:

That Judgment be entered as follows:

1. The schedule of sewer service charges adopted by the defendant the Carlstadt Sewerage Authority on April 11, 1968, be and hereby is declared and adjudged to be illegal, contrary to the law, null and void, and be and hereby is set aside, in the following respects:

a) The capacity charge is not proportional and is therefore deemed inequitable and is null and void and hereby set aside.

b) The connection fee of $1,500 is valid and legal and is hereby upheld; however, the other connection fees of $3,000 and $5,000 are deemed to be penalties and are hereby declared null and void.

2. That all bills for sewer service charges rendered to date or any such bills to be rendered in the future for sewer service charges that are based upon the aforesaid

schedule of sewer service charges adopted April 11, 1968, be and hereby are declared to be null and void and such bills be and hereby are cancelled, to the extent specified in paragraph 1 above.

3. To the extent specified in paragraph 1 above, any and all liens on property owned or occupied by the plaintiffs created as a result of the non-payment of the aforesaid bills for sewer service charges be and hereby are discharged and declared to be null and void and of no effect.

4. To the extent set forth in paragraph 1 above, the defendants, their officers, agents, servants and employees, and any person or persons acting in concert with them, be and hereby are permanently restrained and enjoined from collecting or attempting to collect from plaintiffs any sewer service charges based upon the aforesaid schedule of sewer service charges adopted April 11, 1968, and they are further permanently restrained and enjoined from making, assessing or imposing any further sewer service charges against the plaintiff based upon the aforesaid schedule of sewer service charges adopted April 11, 1968. The foregoing is granted for the following reasons.

a) It is within the power of the municipality, the Borough of Carlstadt, to set up the Carlstadt Sewerage Authority within any area or part of the Borough and the two separate districts set up by the Borough of Carlstadt is valid and legal and is hereby upheld.

b) There is no inequality or violation of any constitutional provision with respect to equal protection of the law or due process as a result of the district east of Berry's Creek, under the jurisdiction of the Carlstadt Sewerage Authority, being separate and apart from and the plaintiffs' necessity to pay sewer service charges for the construction and maintenance of the sewage system in that district in addition to the payment of their general taxes.

c) The creation of the Carlstadt Sewerage Authority is proper and legal in all respects.

d) The Carlstadt Sewerage Authority may have both a use or service charge or any combination of the same.

e) The use charge of the Carlstadt Sewerage Authority is valid and legal.

5. To the extent set forth in paragraph 1, above, the defendants, their officers, agents, servants and employees, and any person, or persons acting in concert with them, be and hereby are permanently restrained and enjoined from cutting off connections to the sewerage system of the defendants by the plaintiffs or from cutting or shutting off water service charges based upon the schedule of sewer service charges adopted April 11, 1968.

6. To the extent set forth in paragraph 1 above, it hereby is declared and adjudged that the bills rendered to the plaintiffs for sewer service charges prior to the connection of each respective plaintiff to the sewerage system of the defendant Carlstadt Sewerage Authority are null and void and said bills be and hereby are cancelled. The question as to payment of a use charge has been ruled upon, and as to the capacity charge, the Court has ruled that the present rate is invalid.

And is is FURTHER ORDERED:

The plaintiffs within Stage I are hereby ordered to connect to the sewage system of the defendant, The Carlstadt Sewerage Authority, within thirty (30) days from the date hereof.

And it is FURTHER ORDERED

That Judgment be entered as follows:

1. It is within the power of the municipality, the Borough of Carlstadt, to set up the Carlstadt Sewerage Au-

thority within any area or part of the Borough and the two separate districts set up by the Borough of Carlstadt is valid and legal and is hereby upheld.

2. There is no inequality or violation of any constitutional provision with respect to equal protection of the law or due process as a result of the district east of Berry's Creek, under the jurisdiction of the Carlstadt Sewerage Authority, being separate and apart and the plaintiffs' necessity to pay sewer service charges for the construction and maintenance of the sewage system in that district in addition to the payment of their general taxes.

3. The creation of the Carlstadt Sewerage Authority is proper and legal in all respects.

4. The Carlstadt Sewerage Authority may have both a use or service charge or any combination of the same.

5. The use charge of the Carlstadt Sewerage Authority is valid and legal.

6. The capacity charge is not proportional and is therefore deemed inequitable and is null and void and hereby set aside.

7. The connection fee of $1500.00 is valid and legal and is hereby upheld; however, the other connection fees of $3,000.00 and $5,000.00 are deemed to be penalties and are hereby declared null and void.

Morris Malech /s/
MORRIS MALECH, *J. S. C.*

Dated: July 7, 1969

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MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein from the judgment of the Supreme Court of New Jersey on the ground that the validity of the *New Jersey Sewerage Authorities Law of 1946*, Revised Statutes of New Jersey, Title 40, Chapter 14A, Section 1 and following *R.S.* 40:14A-1, *et seq.*, is not "drawn in question . . . on the ground of its being repugnant to the Constitution . . ." as required under Title 28 of the United States Code, Section 1257(2), 28 U.S.C. 1257(2). Alternatively, treating the appeal as a petition for certiorari under 28 U.S.C. 2103, the appellee moves the Court to deny the petition on the ground that it fails to present a substantial federal question.

ARGUMENT

I. There is no jurisdiction over the appeal under 28 U.S.C. 1257(2).

The appellants rely on 28 U.S.C. 1257(2) as conferring jurisdiction on this Court to hear the appeal from the judgment of the Supreme Court of New Jersey, 28 U.S.C. 1257(2) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity."

The state statute relied upon by appellants as coming within Section 1257(2) is the *New Jersey Sewerage Authorities Law of 1946, R.S.* 40:14A-1, *et seq.* The appellant's Jurisdictional Statement, however, does not attack the validity of such statute per se, but rather attacks the validity of its implementation and application to them by the Carlstadt Sewerage Authority on the ground that they are being deprived of equal protection of the laws and due process under the Fourteenth Amendment. (Appendix B, p. 42a). The appellee submits that the latter claim is not encompassed by Section 1257(2).

Section 1257(2) is applicable only where a state statute is challenged as unconstitutional as written. A challenge to unconstitutional implementation of a valid state statute may only be made by a petition for certiorari

under Section 1257(3). *Rohr Aircraft Corp. v. County of San Diego,* 362 U.S. 628, 629-30 (1960); *Charleston Federal Sav. & Loan Asso. v. Alderson,* 324 U.S. 182, 185 (1945); *Jett Brothers Distilling Co. v. Carrollton,* 252 U.S. 1, 6 (1919); See *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 717, 721, 726, 727 (1961); *Lerner v. Casey,* 357 U.S. 468, 473 (1958); *Cf. Garrity v. New Jersey,* 385 U.S. 493 (1967) (state statute too tangentially involved to form the basis of an appeal); *Ex parte Bransford,* 310 U.S. 354, 361 (1940) (distinguishing between a petition in the Federal District Court for an injunction against the enforcement of a state statute on the ground of its unconstitutionality and a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by use of a state staue which is not attacked as unconstitutional).

In *Rohr Aircraft Corp. v. County of San Diego, supra,* the appellant appealed from a judgment of the Supreme Court of California affirming a lower state court judgment holding that realty, title to which was in the Reconstruction Finance Corporation, fell within the scope of Section 8 of the Reconstruction Finance Corporation Act, 15 U.S.C. 601, which subjected to local taxation any real property of the Corporation, even though such property had been declared to be surplus under the *Surplus Property Act of 1944,* 58 Stat. 765. The appellant had leased the property from the Corporation and by terms of its leases undertook to pay all taxes legally assessed against the property. It contended that taxation of the property under state law violated its rights under the Fourteenth Amendment in light of the *Surplus Property Act of 1944, supra.* This Court dismissed the appeal and in so doing stated, ". . . it has long been settled that an attack upon a tax assessment or levy, such as [appellants] here made on the ground that it infringes a

taxpayer's federal rights, privileges, or immunities, will not sustain an appeal. . . . *Charleston Federal Sav. & Loan Asso. v. Alderson,* 324 U.S. 182, 185 (1945)". Although the Court did treat the appeal as a petition for certiorari under 28 U.S.C. 2103 and granted certiorari, it adhered to the principle that an appeal will not lie from improper implementation of a valid state statute.

In *Charleston Federal Sav. & Loan Asso. v. Alderson, supra,* the appellant appealed an assessment of their property at its full value by tax officials of West Virginia on the ground that the official's mode of valuation of property of the same class belonging to other taxpayers denied the appellants equal protection of the laws under the Fourteenth Amendment. Such assessment as well as valuation was made by the tax officials in implementation of state law and the Supreme Court of Appeal of West Virginia affirmed the tax officials' action. This Court dismissed the appeal.

> "It is essential to our jurisdiction on appeal . . . that there be an explicity and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. [cases cited] And it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's Federal rights, privileges, or immunities, will not sustain an appeal . . . [cases cited] . . . *While the opinion (of the Supreme Court of Appeal of West Virginia) intimates that appellant's objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the Federal Constitution.*" at 185-86. (emphasis added.)

In *Jett Brothers Distilling Co. v. Carrollton, supra,* the appellant appealed the judgment of the Court of Appeals of Kentucky which had affirmed a lower state court

judgment holding appellant liable for a tax levy by the appellee, City of Carrollton, upon distilled spirits belonging to appellant in a bonded warehouse in Carrollton. This Court dismissed the appeal on the ground that the validity of a state statute had not been truly drawn in question.

> "What is meant by the validity of a statute or authority was discussed by this court in *Baltimore & P. R. Co. v. Hopkins,* 130 U.S. 210, in which this court, speaking by Mr. Chief Justice Fuller, said: 'Whenever the power to enact a statute as it is by its terms or is made to read by construction is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.' And the Chief Justice added, upon the authority of *Millinger v. Hartupee,* 6 Wall 258, 261, 262, that the word 'authority' stands upon the same footing.
>
> In order to give this court jurisdiction by writ of error . . . it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties ,or laws, so as to require the state court to decide the question of validity in disposing of the contention . . ." at 6.

In all three of the above cases, this Court dismissed attempted appeals, because state statutes were not drawn in question as required by 28 U.S.C. 1257(2). So too, in the instant case, the *New Jersey Sewerage Authorities Law of 1946, supra,* is not truly drawn in question. In this regard, the first three cases cited by the appellants in support of the jurisdiction of this Court under Section 1257(2) are all distinguishable in that state statutes were drawn in question.

In *Trego v. Modesto Irrigation District,* 164 U.S. 179 (1896), the appellant's real contention was that amendments to a California statute authorizing the establishment of irrigation districts within the state operated to deprive him of property without due process of law. The amendments provided that special elections could be called by the board of directors of the district to approve the issuance of bonds by the district, that property owners of the district could withdraw their land from the district by a court approved petition and that the board of directors could obtain a judicial determination of the validity of proceedings in respect to the issuance of bonds, before or after their issuance. The appellant contended that the three amendments collectively operated to unconstitutionally permit court approval of the binding of property owners within a diminished district, due to the withdrawal of other property owners, to an earlier vote by all the property owners of the original district approving the issuance of bonds, even though such bonds had not been issued. Thus, specific provisions of an amended state statute as written were alleged to collectively violate the Fourteenth Amendment. "... [T]he real contention of the defendant was and is that the operation of the statute is to deprive him of property without due process of law." 164 U.S. 179 at 185. The right of the defendant to appeal to this Court under the predecessor of 28 U.S.C. 1257(2) was, therefore, sustained.

In *North Carolina R. Co. v. Zachery,* 232 U.S. 248 (1914), the appellant railroad appealed the judgment of the North Carolina Supreme Court affirming the judgment of a lower state court holding that North Carolina state law and not the Federal Employer's Liability Act of April 22, 1908, 35 Stat. at L. 65, Chap. 149, applied to a civil action for the negligent killing of locomotive fireman. This Court

sustained the appeal under the predecessor of 28 U.S.C. 1257(2) as the validity of the applicable state statute vis a vis the Federal Employer's Liability Act was clearly drawn in question. In the instant case, however, there is no alleged conflict between the *New Jersey Sewerage Authorities Law of 1946* and any other federal law or allegation that the former law is inapplicable to the instant case. Thus, *North Carolina R. Co. v. Zachary* is likewise inapposite to the instant case.

In *De Veau v. Braisted*, 363 U.S. 144 (1960), a specific statutory provision of the *New York Waterfront Commission Act of 1953*, N.Y. Laws 1953, cc 882, 883, was challenged as preempted by Federal labor laws, violative of the due process clause of the Fourteenth Amendment and invalid as a bill of attainder or ex post fact law. The validity of the provision was upheld by the Court of Appeals of New York against the foregoing challenge. The appellant then appealed to this Court, which held that the case was properly before it on appeal. Again, however, there was an allegation of a conflict between the provision and specific federal labor laws and the provision was attacked as unconstitutional per se rather than implementation thereunder. Thus, in all three of the above cases a state statute was actually drawn in question.

Finally, the last case cited by appellants as supporting jurisdiction under 28 U.S.C. 1257(2), *Thompson v. Louisville*, 362 U.S. 199 (1960) is inapplicable. It was brought to the Court as a petition for certiorari and not by appeal. In brief, all those cases cited by the appellants are either distinguishable from or inapplicable to the instant case.

The opinion of the New Jersey Supreme Court sets forth the issue raised by appellant as follows: "Does The Division Of The Municipality Into Two Sewer Districts

Violate The Terms of *N.J.S.A.* 40:14A-1, *et seq.*, and The Fourteenth Amendment of the United States Constitution." (Appendix B, p. 42a). The two questions presented in the appellant's Jurisdictional Statement basically restate the issue as posed by the New Jersey Supreme Court. In summary, the appellant does not attack a state statute, but mere exercise of authority under such statute and the latter does not constitute a basis for appeal under 28 U.S.C. 1257(2).

II. No substantial federal question is presented.

The basic issue presented by the appellants in their Jurisdictional Statement is a factual one, namely, whether their lands warrant the installation and direct charging for special sewer service in relation to the remaining lands of the Borough of Carlstadt. In this regard, the law is well-established. In *Walters v. St. Louis,* 347 U.S. 231 (1953) this Court stated:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary." at 237.

The New Jersey Supreme Court found several factors warranted the different treatment of appellants' lands from other Carlstadt lands for sewerage purposes, eg., use, topography, pollution, absence of other alternatives. (Appendix, p. 47a). Such factual determination should not be subject to certiorari. This Court has consistently held that it will not exert its jurisdiction merely to review a decision

of a state court upon a question of fact. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see also *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918). Cf. *Citizens Nat. Bank v. Durr*, 257 U.S. 99 (1921).

In the final analysis, the issue presented by appellants to this court is important only as to them. There is no showing, other than a blanket assertion, that property owners in other municipalities have been, are being or will be affected by the decision in this case. In this regard, the concept of importance as a basis for certiorari relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1954). In summary, the law concerning the appellants' claim is settled, the claim is basically a factual one and its resolution only has importance for the appellants. Under such circumstances, a substantial federal question is not presented and certiorari should not be granted.

CONCLUSION

Wherefore, Appellee respectfully submits that the Court does not have jurisdiction over the instant appeal under 28 U.S.C. 1257(2) and moves the Court to dismiss the appeal. Alternatively, the Appellee respectfully submits that the case does not present a substantial federal question and that certiorari should be denied.

Respectfully submitted,

/s/ Alfred J. Porro Jr.
ALFRED J. PORRO JR.
Counsel for Appellees

On the Brief:

GEORGE N. PAPPAS

TONITA SANDO FLYNN